IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 87.

MANAGED FUNDS, INCORPORATED,
Petitioner,

vs.

J. JOHN BROUK et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF

For Respondents, Jacob Baker and George H. Shields, III.

In lieu of filing a separate brief on the merits, Respondents Baker and Shields respectfully:

1. Adopt the brief on the merits being filed for Respondents J. John Brouk et al., and

2. Request the Court to consider the argume
in the "Brief in Opposition" (blue cover) f
Respondents Baker and Shields.

Respectfully submitted,

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Attorney for Respond
Baker and Shields.

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SUPREME COURT, U. S.

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Respondents.

SUGGESTION THAT THE ABOVE CAUSE HAS BECOME MOOT AND JOINT MOTION OF PETITIONER, MANAGED FUNDS, INCORPORATED, AND RESPONDENTS TO VACATE AND REMAND.

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SUGGESTION THAT THE ABOVE CAUSE HAS BECOME MOOT AND JOINT MOTION OF PETITIONER, MANAGED FUNDS, INCORPORATED, AND RESPONDENTS TO VACATE AND REMAND.

Come now Petitioner, Managed Funds, Incorporated, and Respondents J. John Brouk, Jefferson J. Rebstock, Earl R. Rice, W. Munro Roberts, Jr., and James J. Mullen, Jr., Jacob Baker and George H. Shields, III, and respectfully move this Court for an order vacating the judgment of the United States Court of Appeals for the Eighth Circuit and remanding this cause to the United States District Court for the Eastern District of Missouri, Eastern Division, with instructions to dismiss the Respondents from this Cause, for the reason that the controversy involved

between Petitioner and Respondents has become moot by reason of the settlements hereinafter set forth between Petitioner and Respondents (and others) after trial, and after decision and judgment in the Chancery Court of the State of Delaware, in a companion case, approving the principal settlement ($950,000.00) and holding that court approval of the supplemental settlement, involving these respondents ($100,000.00), to be unnecessary.

1. **Issue Before This Court.** This cause is before this Court on a writ of certiorari to the Court of Appeals for the Eighth Circuit. The said Court of Appeals, in an interlocutory appeal under 28 U. S. C. A., Section 1292 (b), reversed an order of the United States District Court for the Eastern District of Missouri overruling Respondents' motions to dismiss the Respondents for lack of Federal jurisdiction.

2. **Brief Statement of Grounds for This Motion.** As grounds for this motion, Petitioner sets forth below in detail, the facts regarding the litigation, pending in three courts in this case, showing (in brief): that all the principal issues in the case, now pending in the United States District Court below, were tried, submitted and decided by the Chancery Court of the State of Delaware as to parties there sued; that in that case—originally a stockholder's derivative suit,—Petitioner, Managed Funds, Inc. was given and assumed primary responsibility and control of the trial and briefing of the case; that the Court determined that the total joint and several liability of each class of defendants (hereinafter set forth in detail) amounted to the sum of $1,217,997.79; (b) that thereafter, before entry of judgment, settlement with certain Broker Defendants for the sum of $950,000.00 was duly approved by said Court after due notice to shareholders; (c) that thereafter judgment was entered for the balance of said liability, $267,997.79, against the non-settling defend-

ants therein (including one of the Respondent Directors and against the sequestrated property of another Respondent Director, who did not appear generally in said Delaware Court); that thereafter the liability of all of the Directors (including Respondents but not including Hilton H. Slayton and Hovey E. Slayton) was thereupon settled for the sum of $100,000.00, reserving all rights against the "Slayton defendants", hereinafter mentioned; that the said Delaware Chancery Court held that approval of the said settlement with the said Directors was not required, for the reason that Petitioner had been charged with primary responsibility and control of the said litigation and had prosecuted the case to judgment, and was in the control of an independent Board of Directors; that said settlement was thereupon consummated, with the stipulation that the Petitioner and the Respondents, who were parties to said supplemental settlement for $100,000.00, would jointly apply to this Court suggesting that the case was moot, moving for vacation of judgment of the Court of Appeals for the Eighth Circuit and remanding to the District Court for action consistent with settlement.

For the information of the Court, the details of the circumstances above set forth and in support of this motion are stated as follows:

3. **The Litigation Relevant to This Motion.** This litigation followed publicity which was given to an investigation of this mutual fund by the Securities Exchange Commission in May, 1959, reported in CCH Fed. Sec. L. Rep., 1957-1961 Decisions, Para. 76,662, p. 80,504, issued on July 30, 1959. Three principal cases were filed, on the same state of facts, as follows:

(a) Petitioner, Managed Funds, Inc. in May, 1959, instituted the present action in the United States District Court for the Eastern District of Missouri at St. Louis, Missouri, styled in that court, **Managed Funds, Incor-**

porated v. Slayton Associates et al., No. 59C 162, against certain of its former directors, its advisers, underwriters and brokers. This case did not come to trial and is pending, upon certiorari, in this Court as **Managed Funds, Inc. v. Brouk** et al. The respondent directors herein were not originally joined but in October, 1959, they were named as defendants in an amended complaint. This amendment occasioned withdrawal of original counsel, and shortly thereafter, prosecution of all the litigation was taken over by present counsel.

(b) The principal derivative stockholder's suit (tried on the merits) was instituted in the same month (May, 1959) on behalf of Petitioner in the Court of Chancery of the State of Delaware, in and for the County of New Castle, styled **Lutz v. Boas** et al., Cause No. 1147, alleging the same causes of action against certain of the same defendants named in the aforementioned cause. Subsequently, upon appearance and application of the undersigned counsel for Managed Funds, Inc., in December, 1959, Petitioner, Managed Funds, Inc. was realigned in said cause as a party plaintiff, and upon accession of new and independent management, the corporation was given "primary control and responsibility" for the conduct of that case in April, 1960, before trial.

(c) A derivative stockholder's suit, **Josephson v. Slayton**, et al., No. 59 C 273 (3), had been filed, in the same month of May, in the United States District Court for the District of Delaware, alleging the same causes of action against certain of the defendants named in the two aforementioned causes. **Josephson v. Slayton** et al., was then transferred to the United States District Court in St. Louis and remained dormant until Nov. 13, 1959 when a petition to intervene was filed in said cause by another stockholder, Protective Casualty Insurance Company, and on January 29, 1960, Protective Casualty, the intervening

stockholder, was granted leave to intervene and to file an amended complaint. Said cause was consolidated with **Managed Funds v. Slayton Associates** et al., by order of Court, dated 11th day of March, 1960. The motions of Respondents to dismiss, mentioned in paragraphs 1 and 6 hereof were filed in these consolidated causes.

Counsel for **Managed Funds, Inc.** argued and briefed Respondents' motions in the trial court, and upon interlocutory appeal, and prosecuted all proceedings and filed all briefs in this Court, upon certiorari.

4. There were three "classes" or "groups" of defendants in each of the three aforementioned causes and different defendants within each of these three groups were served or appeared in each of the cases: (1) Hilton H. Slayton, Hovey E. Slayton and the advisory and underwriting companies which they controlled (referred to herein as "Slayton Defendants"), (2) the brokerage firm of Model, Roland & Stone, its partners, and certain of its associates (referred to herein as "Broker Defendants"), and (3) certain of Petitioner's former directors (referred to herein as "Directors").

5. The following tabulation shows, graphically, all defendants who were joined and who appeared generally or specially or were served by process, or sequestration of property, in each of the above-mentioned cases:

United States District Court — St. Louis, Mo.		Delaware Chancery Court, Wilmington, Del.
(Managed Funds, Incorporated, vs. Slayton Associates, Inc.	Jaeroheon vs. Slayton et al., Protective Casualty Co., Intervenor	Lutz (Brockenridge, Her Executor, by Substitution) vs. Boas et al.
(Managed Funds, Incorporated vs. Brouk et al. in This Court)		
Slayton Defendants:		
Hilton H. Slayton	Hilton H. Slayton	Hilton H. Slayton
Hovey E. Slayton	Hovey E. Slayton	Hovey E. Slayton
Slayton Associates, Inc.	Slayton Associates, Inc.	Slayton Associates, Inc.
Slayton & Co., Inc.	Slayton & Co., Inc.	.....
Mutual Fund Distributors, Inc.	Mutual Fund Distributors, Inc.	.....
Broker Defendants:		
Model, Roland & Stone	Model, Roland & Stone	Model, Roland & Stone
Leo Model	Leo Model	Leo Model
Rolf R. Roland	Rolf R. Roland	Rolf R. Roland
Frits Markus	Frits Markus	Frits Markus
Robert Rosenberg	Robert Rosenberg	Robert Rosenberg
Walter H. Berton	Walter H. Berton	Walter H. Berton
Walter S. Morris	Walter S. Morris	Walter S. Morris
Erwin Wolff	Erwin Wolff	Erwin Wolff
Herman E. Stone	Herman E. Stone	Herman E. Stone
Elliot D. Fox	Elliot D. Fox	.....
Frank L. Thompson	Frank L. Thompson	.....
Stephen M. Jaquith	Stephen M. Jaquith	.....
Harold W. Smith	Harold W. Smith	.....
James S. Stubbs	James S. Stubbs	.....
Directors:		
Earl R. Rice	Earl R. Rice	Earl R. Rice
Jefferson J. Rebstock	Jefferson J. Rebstock	Jefferson J. Rebstock (only to extent of property sequestered)
J. John Brouk	J. John Brouk	.....
James J. Mullen Jr.	James J. Mullen Jr.	.....
W. Munro Roberts, Jr.	W. Munro Roberts, Jr.	.....
Lloyd E. Boas	Lloyd E. Boas	.....
Robert A. Hicks	Robert A. Hicks	.....
George H. Shields, III	.....	.....
Edwin J. Cunningham	.....	.....
Charles E. Brown	.....	.....
Jacob Baker	.....	.....

6. There was no diversity of citizenship as to the defendants in the action brought in the United States Courts and the basis for federal jurisdiction was that the complaint stated a cause of action under the Investment Company Act of 1940. The Directors (with the exception of Lloyd E. Boas who filed an answer), appeared specially and filed motions to dismiss the complaints, because of the lack of federal jurisdiction, asserting the jurisdictional question involved in this petition for certiorari: that the

Investment Company Act of 1940 did not create any statutory duties, violation of which gives rise to a private right of action in favor of a mutual fund against its former directors. The said District Court in St. Louis entered an order overruling said motions, but drafted its order to conform to the requirements of 28 U. S. C. A., Section 1292 (b), relating to interlocutory appeals, and said order also provided that "if appeal is permitted, the proceedings herein are stayed until further order". Thereafter, the United States Court of Appeals for the Eighth Circuit permitted the interlocutory appeal under Section 1292 (b), and, on appeal, the case was briefed and argued by Petitioner, Managed Funds, Inc., and Respondents. On January 13, 1961, the said Court of Appeals reversed the order of the District Court overruling said motions to dismiss, and adjudged that the appealing directors be dismissed for lack of federal jurisdiction, sustaining Respondents' contention that the Investment Company Act of 1940 did not impose any duties upon directors of a mutual fund, a breach of which would give rise to a private right of action by a mutual fund against its directors.

7. Subsequently Managed Funds petitioned this Court for a writ of certiorari in **Brouk v. Managed Funds, Inc.**, and pending a ruling on said petition the mandate of the United States Court of Appeals for the Eighth Circuit was stayed by the latter Court. Thereafter, a writ of certiorari was granted by this Court, briefs have been filed by Petitioner and Respondents and the matter is now pending in this Court awaiting oral argument.

8. **The Trial and Separate Settlement with the Broker Defendants in Delaware.** In the meantime (February to May 1960), Petitioner, Managed Funds, Inc., proceeded with preparation of the Delaware case, which was set for early trial, and where there were no jurisdictional questions. The Delaware case, **Lutz v. Boas, et al.**, was tried by Petitioner and the Broker Defendants and

Directors before that Court, and submitted to the Chancery Court on a voluminous record including depositions of almost all of the aforementioned defendants in the three cases, hundreds of exhibits and oral testimony adduced before the Court, on the trial of that cause beginning May 16, 1960. Thereafter, extensive briefs were prepared and filed over the following six months by the Petitioner and by the Defendants appearing in that cause. The cause was argued in the said Chancery Court on November 28, 1960.

The said Chancery Court rendered its decision on the merits on May 25, 1961, in favor of Managed Funds, Inc., holding that the defendants, who were there served or appeared, were jointly and severally liable to Managed Funds (reported in 171 A. 2d 381). The entry of judgment was postponed pending computations from the record of the dollar amount of the liability as found by the Court. A hearing on such "matters undetermined" was set for October 9, 1961 and a supplemental opinion was issued, dated November 10, 1961, reported in 176 A. 2d 853.

On September 22, 1961, prior to the actual entry of judgment in **Lutz v. Boas** et al., Managed Funds and the Broker Defendants entered into a stipulation for a separate settlement for the sum of $950,000.00. (The total liability of the defendants in the said Delaware cause was later determined to be $1,217,997.79). After due notice to stockholders, and with no stockholders appearing to object, the Court of Chancery on November 21, 1961, approved the stipulation of separate settlement between Managed Funds and the Broker Defendants. Also, on November 21, 1961, judgment was entered by said Chancery Court, confirming approval of the settlement and dismissing the Broker Defendants, who were in court, with prejudice. Judgment was also entered against the Slayton defendants there sued, defendant Earl R. Rice and defendant Jefferson J. Rebstock to the extent of his property sequestered (after crediting their liability with the pro-

ceeds of the settlement) for the sum of $267,997.79 (with interest of $322,644.20 against the Slayton defendants). The Chancery Court reserved jurisdiction to consummate the settlement and to enforce plaintiff's rights against all defendants over which it had jurisdiction in said cause. Defendant Earl R. Rice (a Respondent here), took an appeal to the Supreme Court of Delaware.

9. **Dismissal of Broker Defendants in St. Louis Federal Court as a Condition of Settlement.** The Delaware stipulation of separate settlement with the Broker Defendants provided that the sum of $950,000.00 would be deposited in the Registry of the Delaware Chancery Court and that said sum should be released to Petitioner unconditionally upon Petitioner filing with said Chancery Court a certified copy of an order of the United States District Court in St. Louis dismissing the consolidated actions pending there with prejudice and without costs as against the Broker Defendants. The stipulation provided further that if such an order was not filed within sixty days after November 21, 1961, the said sum of $950,000.00 was to be returned to the Broker Defendants, and judgment in the full amount was in such case to be reinstated against the Broker Defendants before the Delaware Court in accordance with the said decision and findings of the said Delaware Court.

10. **Frustration of Settlement With Broker Defendants.** On November 30, 1961, and thereafter, the Broker Defendants and Managed Funds, Inc. moved in the United States District Court in St. Louis to modify the above-mentioned stay order entered by the said District Court in St. Louis at the time the interlocutory appeal was taken, for the purpose of permitting Managed Funds and the Broker Defendants to obtain a dismissal of the Broker Defendants as required by the stipulation of separate settlement. The Directors, including the Respondents herein, objected to these motions on the grounds that their rights, including

their right to assert cross claims for indemnity against the Broker Defendants in the District Court in St. Louis, would be prejudiced if, prior to a ruling by this Court on the jurisdictional issues now before it, the Broker Defendants were dismissed from the causes pending in the said District Court. Thereafter, on January 11, 1962, the said motions to modify or set aside the stay order were denied.

11. **Application in Delaware to Vacate Settlement With Broker Defendants.** Managed Funds upon failure of the settlement with the Broker Defendants, then filed a motion in the said Chancery Court in Delaware to vacate and modify the judgment of November 21, 1961, for failure to consummate the settlement, praying for entry or reinstatement of the judgment against the Broker Defendants before the Court, in the full amount, in accordance with the Court's decision and findings as provided in the said stipulation of separate settlement, and further praying that the Court modify or enter a new judgment against the other defendants in said cause for the full amount of their liability (for the reason that prior to entry of judgment against them, their total liability for damages had been credited with the amount of the settlement proceeds.)

12. **The Settlement With Directors, Making This Appeal Moot After Waiver by Broker Defendants of Order of Dismissal in Federal Court.** The Broker Defendants and Respondents then offered to consummate the settlement with waiver by the Broker's of the requirement of such dismissal in the St. Louis actions, if Managed Funds would agree to accept $100,000.00 in settlement of its claims against all said Directors, said joint offer including the requirement that mutual releases be exchanged so as to settle all questions of cross-claims between the defendants for indemnity or contribution. Thereupon, on January 19, 1962, just prior to the hearing on application to reinstate

the judgment in Delaware, a second stipulation was entered into by and on behalf of Managed Funds, the Broker Defendants and, also the Directors (including the Respondents herein) which also amended or modified the original stipulation of separate settlement between the Broker Defendants and Petitioner so as to waive such dismissal in the St. Louis District Court. A copy of said stipulation of January 19, 1962, is hereto annexed as Appendix A. In such January 19, 1962, stipulation, the Broker Defendants agreed to waive unconditionally the requirements contained in their stipulation of September 22, 1961, that they be dismissed with prejudice from the causes pending in the United States District Court in St. Louis, and, Managed Funds, Inc. agreed to accept in compromise and settlement of all its claims against the Directors, including Respondents herein (all of whom denied liability), the additional sum of $100,000.00, reserving its rights against the Slayton Defendants. The said stipulation also provided that Director-Respondent Earl R. Rice dismiss his appeal to the Supreme Court of Delaware and that Managed Funds, Inc. would join with the Respondents herein in a motion before this Court suggesting the settlement of January 19, 1962, with the Directors, including Respondents, that the controversy involved and presently pending before this Court had become moot and praying for an order of this Court vacating the judgment of the Court of Appeals for the Eighth Circuit and remanding the case to the District Court in St. Louis with directions for further appropriate proceedings consistent with the settlement. The Securities and Exchange Commission, Amicus Curiae, was kept advised of the said settlement negotiations and of said stipulation of January 19, 1962.

Thereupon, the $950,000.00 held by the Register in Chancery was unconditionally released to Managed Funds, and Managed Funds also has now received from Directors, in-

cluding the Respondents herein and other defendants, an additional sum of $100,000.00 as provided in the said January 19th stipulation. Pursuant thereto, Managed Funds, Inc., the Broker Defendants and the Directors (except Hilton H. and Hovey E. Slayton), have exchanged mutual covenants not to sue or releases, and Respondent Earl R. Rice has dismissed his appeal in Delaware. In connection with orders releasing funds of Defendant Directors Rice and Rebstock from seizure and sequestration, pursuant to settlement, the Delaware Chancery court ruled, as above stated, that it was not necessary that Petitioner's said settlement with the Directors be submitted to the Delaware Court for its approval.

13. By reason of the aforesaid settlement with the Directors, including Respondents herein, all the claims of Petitioner, Managed Funds, Inc., against the Directors, including Respondents herein, have been settled and compromised, and accordingly, all controversies involved in the proceeding presently pending before this Court have become moot.

14. Petitioner is advised and respectfully submits that under the decisions of this Court the proper procedure to be followed when a case pending in this Court becomes moot by settlement is as herein prayed, namely, the entry of an order vacating the judgment of the Circuit Court of Appeals and remanding the cause to the lower court with directions for dismissal of Respondents. A memorandum of authorities is hereto attached as Appendix B.

Wherefore, Petitioner respectfully prays the Court that it enter its order finding that the controversy between Petitioner and Respondents has become moot, vacating the judgment of the Court of Appeals for the Eighth Circuit and remanding the case to the United States District Court for the Eastern Division of the Eastern District of

Missouri for dismissal of Respondents and such further action as said Court may deem proper.

Respectfully submitted,

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APPENDIX "A."

In the Court of Chancery of the State of Delaware in and for New Castle County.

Hunter Breckenridge, Executor u/w Nettie M. Lutz, Deceased, and Managed Funds, Inc., Plaintiffs, vs. Lloyd E. Boas et al., Defendants.	Civil Action. No. 1147.

In the United States District Court for the Eastern District of Missouri, Eastern Division.

Managed Funds, Inc., Plaintiff, vs. Slayton Associates, a Corporation, et al., Defendants.	No. 59 C 162 (3).
Emanuel Josephson, Plaintiff, Protective Casualty Ins. Co., Intervenor-Plaintiff, vs. Hilton H. Slayton et al., Defendants.	No. 59 C 279 (3).

Stipulation.

It is stipulated and agreed by and between the undersigned parties by their attorneys as follows:

(1) That upon hearing before the Delaware Chancellor for vacation of present judgment, the attorneys for the Model defendants as heretofore defined will acknowledge

performance by Managed Funds, Inc., of paragraph 1 of the stipulation in settlement, waiving compliance with the said provision of said stipulation requiring the filing of an order or judgment of dismissal in the causes mentioned therein, pending in the United States District Court in St. Louis, without prejudice to Model defendant's right to hereafter apply in said St. Louis cases for such dismissal with prejudice as to the settling defendants as defined therein, and the Model defendants will consent to an order by the Chancellor releasing the $950,000 on deposit with the Register unconditionally to plaintiff Managed Funds, without regard to consummation of settlement mentioned below in paragraph 2 hereof, and thereupon judgment heretofore entered on November 21, 1961, shall remain in full force and effect, subject to rights of appeal if any by remaining defendants therein, or by plaintiffs except as to dismissal as to Model defendants.

(2) That plaintiff Managed Funds and plaintiff Breckenridge, Executor u/w Nettie M. Lutz, stipulate and agree, subject to approval of the Chancery Court in Delaware (if such approval shall be deemed necessary by any defendant to be dismissed hereunder, or by either of said plaintiffs or by the Court) to accept in settlement of the liability of all former directors of Managed Funds, Inc. (except Hilton H. and Hovey E. Slayton and Lloyd Boas), who are defendants in this cause or in said causes in United States District Court in St. Louis, the sum of $100,000; and certain of the defendants in this action and in the St. Louis actions have agreed to pay (in amounts agreed to by them among themselves) said sum of $100,000 in settlement of said liability; and that upon payment of said sum to Managed Funds, together with delivery to Managed Funds, Inc., and to the Model defendants and their settling associates of releases executed by each of said directors, with the exceptions noted, of all claims of every kind and character then existing against said Man-

aged Funds, Inc., and said Model defendants respectively, Managed Funds, Inc., and said Model defendants, shall deliver to the same defendant directors covenants not to sue or levy execution against them, or releases, reserving all rights of said Managed Funds, Inc., against the defendants, Hilton H. Slayton, Hovey E. Slayton, Slayton Associates, Inc., Slayton & Co., Inc., and Mutual Fund Distributors (hereinafter referred to as the Slayton defendants) and against Lloyd E. Boas, said sum to be recited as the consideration for said covenants or releases and to be credited against the above-mentioned judgment to be entered in the Chancery Court in Delaware; and plaintiffs, in consideration of said settlement shall consent to and concur in such action as shall be appropriate in connection with the same to release from sequestration or seizure any funds of defendant Rice held by Managed Funds against said judgment to the parties entitled thereto, and also funds sequestered or held, of Jefferson J. Rebstock, subject to the said judgment, reserving all rights of plaintiff against said Slayton defendants and Lloyd E. Boas. Defendant Rice shall thereupon dismiss his appeal, if any, in the Supreme Court of Delaware. Managed Funds, Inc., stipulates and agrees that as advised by counsel and at the request of the Model defendants, it will give such assistance and execute such applications, stipulations, or other documents as may be necessary or appropriate, to effect the dismissal of the St. Louis actions as against all defendants, other than the Slayton defendants and said Boas.

(3) That after consummation of said settlement aforesaid in connection with the action in the Delaware Chancery Court, Plaintiff will prepare and submit jointly with Respondents therein, an application to the Supreme Court of United States suggesting this settlement and that the case has therefore become moot, and praying for an order vacating the judgment of the Court of Appeals for the

Eighth Circuit and remanding the cause to the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri for further appropriate proceedings consistent with settlement.

This stipulation may be signed in separate counterparts.

Approved:

John Vanbrunt,
Attorneys for Directors, Mullen, Brouk, Rice, Rebstock and Roberts.

Richard L. McMahon,
Attorney for Managed Funds, Inc.

William E. Taylor, Jr.,
Attorney for Plaintiff Breckenridge.

John Vanbrunt,
Attorney for Defendant Rice.

Robert H. Richards, Jr.,
Attorney for Model, Roland & Stone and Settling Defendants.

APPENDIX "B"

In the
Supreme Court of the United States,
October Term, 1961.
No. 87.

Managed Funds, Incorporated,
Petitioner

vs.

J. John Brouk, et al.,
Respondents.

Memorandum of Authorities on Procedure.

This cause is presently pending before this Court, upon certiorari, to review a holding of the Court of Appeals for the Eighth Circuit that there was no Federal jurisdiction over the subject matter of Petitioner's claim against the Respondent Directors, because the Investment Company Act of 1940 did not create any statutory duty, violation of which would give rise to such claims.

As pointed out in the foregoing suggestion and joint motion, the Petitioner and Respondents entered into a settlement while this matter was pending before this Court, rendering moot the issues involved in this proceeding. We have not found any precedents of this Court on this subject dealing directly with an interlocutory appeal by only part of the defendants below,—i. e., where the cause becomes moot by reason of partial settlement with some of the defendants,—including those involved in the appeal leaving the action pending below against other defendants.

The principles announced in the cases are, however, clearly defined and can be applied to the circumstances

here presented: It seems to be well-established by a long line of decisions of this Court (a) that when a cause pending before this Court becomes moot, proceedings on the merits should not be had here or in any court below; and (b) that this Court should dispose of the entire case,—not merely of the appellate proceedings which brought it to this Court,—by reversing or vacating the mandates or judgments of all the courts below, and remanding the cause for dismissal of the complaint on the ground that the case is moot. **Securities & Exchange Commission v. Lea Fabrics, Inc.**, 363 U. S. 417, 4 L. Ed. 2d 1515, 80 S. Ct. 1258 (1960); **McGrath v. National Association of Manufacturers**, 344 U. S. 804, 97 L. Ed. 627, 73 S. Ct. 31 (1952); **Snyder v. Buck**, 340 U. S. 15, 95 L. Ed. 15, 71 S. Ct. 93 (1950); **U. S. v. Munsingwear, Inc.**, 340 U. S. 36, 95 L. Ed. 36, 71 S. Ct. 104 (1950); **Duke Power Co. v. Greenwood County**, 299 U. S. 259, 81 L. Ed. 178, 57 S. Ct. 202 (1936); **U. S. v. Anchor Coal Co.**, 279 U. S. 812, 73 L. Ed. 971, 49 S. Ct. 262 (1928); **Berry v. Davis**, 242 U. S. 468, 61 L. Ed. 441, 37 S. Ct. 208 (1916); **Brownlow v. Schwartz**, 261 U. S. 216, 67 L. Ed. 620, 43 S. Ct. 263 (1922); **Alejandrino v. Quezon**, 271 U. S. 528, 70 L. Ed. 1071, 46 S. Ct. 600 (1925); **U. S. ex rel. Norwegian Nitrogen Products Co. v. U. S. Tariff Commission**, 274 U. S. 106, 71 L. Ed. 949, 47 S. Ct. 499 (1926); **Board of Pub. Util. Comm. v. Compania General De Tabacos De Filipinas**, 249 U. S. 425, 63 L. Ed. 687, 39 Sup. Ct. 332 (1918); **Commercial Cable Co. v. Burleson**, 250 U. S. 360, 63 L. Ed. 1030, 39 S. Ct. 512 (1918); **U. S. v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft**, 239 U. S. 466, 60 L. Ed 387, 36 S. Ct. 212 (1915).

The "entire case" referred to in the language of this Court appears to mean the case in **all courts**,—from the trial court through the appellate courts. While here the "entire" case is not disposed of as to all **defendants**, a definitive settlement with part of the defendants requires

disposal of that part of the case in all courts,—not just this Court.

In **Alejandrino v. Quezon,** supra, a Senator of the Philippine Islands Senate sought the issuance of a preliminary injunction and a writ of mandamus to restrain the Senate from depriving him of his rights as a Senator for a period of one year and to compel the Senate to recognize him as a Senator. The Supreme Court of the Philippine Islands, as did the Court of Appeals in this cause, held that there was no jurisdiction in that court. A petition for certiorari was granted by this court, but while the matter was pending here, the one year period had elapsed and the issues involved were moot. This court in disposing of the matter, stated:

> ". . . further steps looking to an adjudication of the cause can neither be had here nor in the court below. In this situation we must, following the established practice of this court, vacate the judgment below and remand the cause with direction to dismiss the petition. . . ." 271 U. S. 535-536, 70 L. Ed. 1074.

In **U. S. v. Anchor Coal Co.,** supra, the parties entered into a settlement while the matter was pending before this Court (see 6 Moore Federal Practice, pp. 3072-3073, Fn. 5). This Court in disposing of the matter stated:

> "These appeals have been fully argued and considered, but in the present situation we find that they present moot issues, and that further proceedings upon the merits can neither be had here nor in the court of first instance. To dismiss the appeals would leave the injunction in force, at least apparently so, notwithstanding that the basis therefor has disappeared. Our action must, therefore, dispose of the cause, not merely of the appellate proceedings which brought it here. The practice now established by this

Court under similar conditions and circumstances is to reverse the decree below and remand the cause with directions to dismiss the bill. The order will be, therefore, that the decree is reversed, with directions to the District Court to dismiss the bill of complaint without costs, because the controversy involved has become moot, and is therefore no longer a subject appropriate for judicial action (Citing cases)."

The purpose of the order prayed is therefore two-fold: to preclude any judicial action on the merits of the controversy in this Court; and second to vacate the action thereon, of all courts below.

Respectfully submitted,

R. WALSTON CHUBB,
ROBERT S. ALLEN,
DOMINIC TROIANI,
611 Olive Street,
St. Louis (1), Missouri,
Attorneys for Petitioner.

CERTIFICATE OF SERVICE.

City of St. Louis, } ss.
State of Missouri. }

R. Walston Chubb, attorney for the Petitioner in the above-entitled cause, upon his oath states that a true copy of the foregoing motion and appendices annexed thereto was served upon the Solicitor General of the United States, Counsel for Securities and Exchange Commission, Amicus Curiae, and upon said Securities and Exchange Commission, whose acknowledgements of service are hereto annexed and the same was also this day by him deposited in the United States mail with first-class postage prepaid, addressed to all counsel of record (other than counsel for the Respondents, who have joined in the foregoing motion), in the consolidated causes in the United States District Court for the Eastern District of Missouri, Eastern Division, entitled **Managed Funds, Incorporated, Plaintiff v. Slayton Associates, Inc., a Corporation** et al., No. 59C 162 (3) and **Emanuel Josephson, Plaintiff, v. Hilton H. Slayton** et al., Defendants, No. 59C 279 (3), as follows:

Lon Hocker and Hocker, Goodwin & MacGreevy, 411 N. Seventh Street, St. Louis 1, Missouri, Attorneys of record for defendants Slayton Associates, Inc., Slayton & Company, Inc., Mutual Fund Distributors, Inc., Hilton H. Slayton and Hovey E. Slayton.

Richmond C. Coburn and Coburn & Croft, 411 No. Seventh Street, St. Louis 1, Missouri, Attorneys of record for defendants Model, Roland & Stone, a co-partnership, and the said named partners.

Cobbs, Armstrong, Teasdale & Roos and William H. Webster, Attorneys of record for defendant Robert Hicks, 506 Olive Street, St. Louis 1, Missouri.

Dubail, Judge & Kilker, 317 North 11th Street, St. Louis 1, Missouri, Attorneys of record for defendant Edwin J. Cunningham.

Lloyd E. Boas, defendant, 901 Washington Avenue, St. Louis 1, Missouri, pro se.

Robert O. Hetlage, 407 North Eighth Street, St. Louis 1, Missouri, Attorney of record for defendant James S. Stubbs.

W. Munro Roberts, Jr., 506 Olive Street, St. Louis 1, Missouri, Attorney of record for defendant Charles E. Brown.

Irving Norris, 800 North American Building, Wilmington, Delaware, Attorney of record for plaintiff Emanuel Josephson.

Benjamin Roth, 611 Olive Street, St. Louis 1, Missouri, Attorney of record for defendant Harold W. Smith.

Biggs, Hensley, Curtis and Biggs and Davis Biggs, 319 North Fourth Street, St. Louis 2, Missouri, Attorneys of record for plaintiff Protective Casualty Insurance Company, Intervenor.

Edward Murphy, 611 Olive Street, St. Louis 1, Missouri, Attorney of record for defendant Stephen M. Jaquith.

Dated this ..... day of ....., 1962.

.....

R. Walston Chubb.

Subscribed and sworn to before me this ..... day of ....., 1962.

.....

Notary Public.

ACKNOWLEDGEMENT OF SERVICE.

Solicitor General.

Receipt is hereby acknowledged this ..... day of ....., 1962 of copy of the foregoing motion to vacate.

.....
Solicitor General,
for Securities and Exchange
Commission, Amicus Curiae.

ACKNOWLEDGEMENT OF SERVICE.

Securities and Exchange Commission.

Receipt is hereby acknowledged this ..... day of ....., 1962 of copy of the foregoing motion to vacate.

.....
General Counsel,
Securities and Exchange
Commission.